

## PROPOSAL TO AMEND ADMINISTRATIVE ORDER 2004-5

*This proposal is presented by the Court of Appeals Case Management Work Group on the basis of nine months' experience under the original Administrative Order and following lengthy consideration by the Work Group that included input from practitioners at the Appellate Practice Section's Annual Meeting on September 22, 2005, and from the APS Council thereafter.*

*"Staff Comments" are provided to highlight areas of proposed change.*

1. Applicability. This amended administrative order applies to appeals filed on or after January 1, ~~2005~~ 2006, arising solely from orders granting or denying motions for summary disposition under MCR 2.116. These appeals are to be placed on an expedited appeal track under which they shall generally be briefed, argued, and disposed of within six months of filing. A motion to remove is required to divert such appeals to the standard appeal track.
  2. Time Requirements. [Unchanged.]
  3. Trial Court Orders on Motions for Summary Disposition. [Unchanged.]
  4. Claim of Appeal – Form of Filing. [Unchanged.]
    - (A) [Unchanged.]
    - (B) When the claim of appeal is filed, it shall be accompanied by:
      - (1) evidence that the transcript of the hearing(s) on the motion for summary disposition has been ordered, or
      - (2) a statement that there is no record to transcribe, or
      - (3) the stipulation of the parties ~~a statement~~ that the transcript has been waived.
- Failure to file one of the above three documents with the claim of appeal will *not* toll subsequent filing deadlines for transcripts or briefs. Sustained failure to provide the required documentation may result in dismissal of the appeal under MCR 7.201(B)(3) so long as the Court of Appeals provides a minimum 7-day warning.
5. Application for Leave – Form of Filing. An application for leave to appeal, or an answer to application for leave to appeal, filed under this administrative order shall conform in all pertinent respects with the requirements of MCR 7.205. At the time an application or an answer is filed, the filing party must provide the Court of Appeals with 5 copies of that party's trial court summary disposition motion or response, brief, and appendices.
  6. Claim of Cross-Appeal. [Unchanged.]

7. Removal from Summary Disposition Track. A party may file a motion to remove the case from the summary disposition to the standard track.

(A) Time to File. ~~Motions to remove by the appellant or the cross-appellant must be filed with the claim of appeal or claim of cross appeal, respectively, or within 7 days after the date of certification of an order granting application for leave to appeal. Motions to remove by the appellee or cross-appellee must be filed no later than the time for filing of the appellee's brief. A motion to remove may be filed by any party at any time.~~ However, filing of the motion most closely in time to discovery of the basis for removal will maximize the likelihood that the motion will be granted.

(B) Form. [Unchanged.]

(C) Answer. An answer to a motion to remove must be filed within 7 days after service of the motion. If applicable, the answer should state whether the appellee is expected to file a claim of cross-appeal.

(D) Disposition. [Unchanged.]

(E) Docketing Statement. [Unchanged.]

(F) Administrative Removal. [Add subsection title but subsection content unchanged.]

(G) Effect of Removal. If the Court of Appeals removes a case from the summary disposition track, the order shall state whether, and the deadlines by which, the parties are entitled to file briefs in accordance with the time and page limitations set forth in MCR 7.212. ~~The time for filing the briefs commences from the date of certification of the order removing the case from the summary disposition docket.~~

8. Transcript – Production for Purposes of Appeal.

(A) Appellant.

(1) The appellant ~~must order~~ may waive the transcript ~~of the hearing(s) on the motion for summary disposition before or contemporaneously with the filing of the claim of appeal or application for leave to appeal, unless there is no record to transcribe or all parties to the appeal stipulate that the transcript is unnecessary. See section 4(B)(3) above.~~

(2) ~~If the appellant desires the transcript for the appeal, the appellant must order the transcript before or contemporaneously with the filing of the claim of appeal.~~ Evidence that the transcript was ordered must be filed with the claim of appeal or application for leave to appeal. Appropriate evidence of the ordering includes (but is not limited to) the following:

(a) Letter to the specific court reporter requesting the specific hearing dates and enclosing any required deposit, or

- (b) "Appeal Transcript, Demand, Order and Acknowledgment" form, or
- (c) Court reporter or recorder's certificate.
- (3) If the transcript is not timely filed, the appellant ~~or an appellee may must~~ file an appropriate of the following motions with the Court of Appeals at any time. ~~within 7 days after the transcript is due.~~ Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.
  - ~~(a) a motion for an order for the court reporter or recorder to show cause, or~~
  - ~~(b) a motion to extend time to file the transcript.~~
- (4) ~~The time for filing the appellant's brief will be tolled by the timely filing of one of the above motions. The order disposing of such motion shall state the time for filing the appellant's brief. If an appropriate motion is filed, the order shall state the time for filing any outstanding brief(s).~~
- (5) Absent an order of the Court of Appeals that resets the time, and regardless whether if the ordered transcript is not timely filed, and if the appellant fails to file either of the above motions within the time prescribed, the time for filing the appellant's brief will commence on the date the claim of appeal was filed or the order granting leave was certified transcript was due. In such event, the appellant's brief shall be filed within 56 days after the claim of appeal was filed or 28 days after certification of the order granting leave to appeal. See section 9(B)(1).

(B) Appellee.

- ~~(1) The appellee may order the transcript within 14 days after service of the claim of appeal and notice that the appellant has waived the transcript.~~
- ~~(2) The appellee's transcript order will not affect the time for filing the appellant's brief.~~
- ~~(3) (1) If the transcript has been ordered by the appellant but is not timely filed by the time the appellant's brief is served on an appellee, the appellee may must file an appropriate motion one of the following motions with the Court of Appeals. within 7 days after the transcript is due: Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.~~
  - ~~(a) a motion for an order for the court reporter or recorder to show cause, or~~
  - ~~(b) a motion to extend the time to file the transcript.~~
- ~~(4) (2) The time for filing the appellee's brief will be tolled by the timely filing of one of the above motions. The order disposing of such motion shall state the time for filing~~

~~the appellee's brief. If an appropriate motion is filed, the order shall state the time for filing any outstanding appellee briefs.~~

- (5) ~~If the ordered transcript is not timely filed, and if the appellee fails to file either of the above motions within the time prescribed, the time for filing the brief will commence on the date the transcript was due.~~

(C) Court Reporter. [Unchanged.]

(D) Transcript Fee. The court reporter or recorder shall be entitled to the sum of \$3.00 per original page and 50 cents per page for each copy for transcripts ordered ~~and timely filed~~ in appeals processed under the expedited docket, if the transcript is filed within 28 days after it was ordered. If the court reporter or recorder does not ~~timely~~ file the transcript within 28 days after it was ordered, the rate will remain \$1.75 per original page and 30 cents per page for each copy, as set by MCL 600.2543.

## 9. Briefs on Appeal.

(A) With the following exceptions, the parties' briefs shall conform to the requirements of MCR 7.212.

(B) Time for Filing.

- (1) ~~In appeals by right, the appellant's brief shall be filed within 56~~ 28-days after the claim of appeal is filed, ~~or as ordered by the Court. In appeals by leave, the appellant's brief shall be filed within 28 days after the order granting leave is certified, or the timely ordered transcript is timely filed with the trial court, whichever is later, or as ordered by the Court.~~ In appeals by leave, the appellant may rely on the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the application for leave to appeal with a new cover page ~~cover letter~~ indicating that the appellant is relying on the application in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1).
- (2) The appellee's brief shall be filed within 28 ~~24~~ days after the appellant's brief is served on the appellee, or as ordered by the Court. In appeals by leave, the appellee may rely on the answer to the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the answer to the application for leave to appeal with a new cover page indicating that the appellee is relying on the answer to the application in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1) and (D)(1).
- (3) Time for filing any party's brief may be extended for 14 days on motion for good cause shown, filed within the original brief filing period. If the motion is filed by the appellant within the original ~~28-day~~ brief filing period, the motion will toll the time for any sanctions for untimely briefs. A motion may include a statement from opposing counsel that counsel does not oppose the 14-day extension. A motion to

extend the time for filing a brief will be submitted for disposition forthwith; opposing counsel need not file an answer.

(4) [Unchanged.]

(C) Length and Form. [Unchanged.]

(1) At the time each brief is filed, the filing party must provide the Court of Appeals with that party's trial court summary disposition motion or response, brief, and appendices. Failure to file these documents at the time of filing the appellant's brief will not extend the time to file the appellee's brief, however. Provided such omission is noted appropriately in the appellee's brief, the appellee may omit these appendices if they were included with the appellant's brief.

(2) ~~The appellant may wish to include a copy of the transcript (if any) if it was completed after the lower court file was transmitted to the Court of Appeals.~~

(D) ~~A r~~Reply briefs may be filed within 14 days ~~of the filing of~~ after the appellee's brief is served on the appellant, and is ~~are~~ limited to 5 pages, double-spaced, exclusive of tables, indexes, and appendices.

10. Record on Appeal. The Court of Appeals shall request the record on appeal from the trial court or tribunal clerk ~~as soon as~~ 28 days after jurisdiction has been confirmed and material filing deficiencies have been corrected. The trial court or tribunal clerk shall transmit the record as directed in MCR 7.210(G).

11. Notice of Cases. [Unchanged.]

12. Decision of the Court. [Unchanged.]

This amended order will remain in effect until December 31, 2006, ~~for two years from the date of its implementation~~, during which time the Court of Appeals Case Management ~~Delay Reduction~~ Work Group will monitor the expedited docket program. If, at any time during that monitoring process, it becomes apparent to the work group that procedural aspects of the program need to be modified, the group is encouraged to seek authorization from this Court to implement modifications. The work group will provide this Court with written updates on the pilot program before the one-year and eighteen-month anniversaries of the program's implementation. At the end of the two-year pilot period, this Court will evaluate expedited processing of summary disposition appeals to determine whether the procedure will be discontinued, changed, or continued.

**Staff Comments follow on the next page  
so that they can be printed and reviewed side-by-side with the proposal.**

**Staff Comment:** The following changes are contained in these proposed amendments.

**4(B)(3)** – Transcripts will only be waived by stipulation of the parties. The appellant may no longer waive the transcripts without the appellee(s)’ agreement.

**5** – Both the application and the answer must conform to MCR 7.205. The trial court summary disposition documents that must be appended to the briefs on appeal are also required to be appended to applications and answers filed under this administrative order.

**7(A)** – Rather than requiring that the appellant file a motion to remove with the claim of appeal, the proposed amendments allow such a motion to be filed at any time. However, the section cautions that filing the motion most closely in time to discovery of the basis for removal will maximize the likelihood that the motion will be granted.

**7(C)** – Answers to motions to remove need only indicate that the appellee is expected to file a claim of cross-appeal if the answer is filed by an appellee and if the time has not yet expired for the filing of a claim of cross-appeal.

**7(F)** – The heading “Administrative Removal” is added as a housekeeping matter.

**7(G)** – An order granting removal will address whether, and the deadlines by which, the parties are entitled to file such briefs as may be filed on the regular track (as to deadline and page limits).

**8(A)(1)** – Transcript orders (if any) must be made by the time the claim of appeal or the application for leave to appeal is filed.

**8(A)(2)** – Evidence of ordering the transcript must be filed with the claim or the application and the form of this evidence includes the enumerated documents. As noted in the final paragraph of section 4, the Court of Appeals will enforce this requirement. However, the proposal does not obligate the Court to monitor or enforce the ultimate filing of the transcript. That responsibility resides with the parties.

**8(A)(3)** – If the transcript is not timely filed, any party may file an appropriate motion at any time. The procedure in appeals on this expedited track will no longer involve a strictly defined and enforced motion practice. Rather, the parties will have the flexibility to manage their appeals as befits the circumstances of each case. As noted, however, avoiding undue delay in filing a motion under the circumstances of the case, and concisely stating the basis for it, will maximize the likelihood that it will be granted.

**8(A)(4)** – Orders that dispose of such motions will state the time for filing any outstanding briefs.

**8(A)(5)** – The past procedure of timing the appellant’s brief from the initial due date of the transcript under certain circumstances will be unnecessary in light of the proposal that the appellant’s brief be due within 56 days of the filing of the claim of appeal.

**8(B)(1)** – This subsection is deleted because appellee will not need to order the transcript. If a hearing was held, the appellant will order the transcript or it will be waived by stipulation of the parties.

**8(B)(2)** – As above, this subsection is deleted because the appellee will not need to order the transcript. If a hearing was held, the appellant will order the transcript or it will be waived by stipulation of the parties.

**8(B)(3)** – An appellee may file an appropriate motion if an ordered transcript has not been filed by the time the appellant's brief is served on the appellee. As above, these amendments provide maximum flexibility to the parties in terms of the type of motion and the timing of it, with the proviso that filing as soon as the need becomes clear will maximize chances of success.

**8(B)(4)** -- Orders that dispose of such motions will state the time for filing any outstanding briefs. It is not necessary that each appellee file a separate motion in order to be included within the terms of an order resetting the deadline for the appellees' briefs.

**8(B)(5)** – This subsection is deleted because the time that the transcript is filed will not impact the due date of the appellee's brief unless the appellee has filed a motion under section 8(B)(3) above.

**8(D)** – Changing "timely filed" to "if the transcript is filed within 28 days after it was ordered" will resolve concerns that arise when the trial court's processes and procedures prevent an otherwise timely request for transcript from being fully communicated to the court reporter for some days or weeks. Under this proposal, the date a request actually becomes an order in the parlance of the local trial court may vary, but the filing 28 days later will be considered timely for purposes of this section. Further, the change clarifies that a court reporter or recorder is not entitled to the higher page rate when the transcript is "timely" filed because an extension has been granted but it was not filed within 28 days after it had been ordered.

**9(B)(1)** – The appellant's brief will be due 56 days after the claim of appeal is filed, without regard to the filing of the transcript, or as ordered by the Court. In an appeal by leave, the appellant's brief will be due 28 days after the order granting leave. If the appellant relies on the application as its brief on appeal, 5 copies of a new cover page must be submitted. That cover page should note whether oral argument is requested or is not requested.

**9(B)(2)** – The appellee's brief will be due 28 days after the appellant's brief is served on the appellee, or as ordered by the Court. The appellee may rely on its answer to application in lieu of a brief, but must file 5 copies of a new cover page and that sheet should note whether oral argument is requested or is not requested.

**9(B)(3)** – Motions to extend time to file briefs should be filed within the original brief filing period in order to toll the time for filing while the motion is pending.

**9(C)(1)** – The appellee may omit the required appendices from its brief on appeal if they were attached to the appellant's brief. Such omission must be noted appropriately in the appellee's brief, however, so that the Court is informed.

**9(C)(2)** – This section is deleted because the situation should not arise if the record is not requested until 28 days after jurisdiction is confirmed or material defects are corrected. See section 10.

**9(D)** – A housekeeping change clarifies that the time for filing a reply brief begins to run when the appellee’s brief is served on the appellant, not when it is filed.

**10** – The amendment states that the Court will order the lower court file within 28 days of confirming jurisdiction and correcting material deficiencies, rather than “as soon as” those issues are resolved. This minimal delay will provide time for the transcripts to be joined up with the trial court files before they are sent to the Court of Appeals, while still securing the file well in advance of the conclusion of briefing.

**Last Paragraph** – The amendment states that the amended AO will remain in effect until December 31, 2006, which was the initial expiration date of the project. The proposal also updates the name of the work group that made the initial summary disposition track proposal and that is monitoring it during the pilot period.